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Federal Communications Law  
Journal

Volume 60 | Issue 2

Article 2


3-2008

# The Two-Step Evidentiary and Causation Quandary for Medium- Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship

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## Recommended Citation

Calvert, Clay (2008) "The Two-Step Evidentiary and Causation Quandary for Medium- Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship," *Federal Communications Law Journal*: Vol. 60: Iss. 2, Article 2.

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# **The Two-Step Evidentiary and Causation Quandary for Medium-Specific Laws Targeting Sexual and Violent Content: First Proving Harm and Injury to Silence Speech, then Proving Redress and Rehabilitation Through Censorship**

**Clay Calvert\***

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## I. INTRODUCTION

Buried deep in its June 2007 judicial rebuke and disapproval of the Federal Communications Commission's ("FCC") recent policy decision to punish television broadcasters for airing isolated and fleeting expletives,<sup>1</sup> the United States Court of Appeals for the Second Circuit in *Fox Television Stations, Inc. v. FCC* made a seemingly minor and inconsequential evidentiary observation.<sup>2</sup> The appellate court wrote that the FCC's edict in 2004 to rein in such language<sup>3</sup> "is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation."<sup>4</sup> Contending that "[s]uch evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech,"<sup>5</sup> the two-judge majority of the Second Circuit openly questioned whether there was really any problem to begin with<sup>6</sup> and concluded that the FCC had "failed to explain how its current policy would remedy the purported 'problem' or to point to supporting evidence."<sup>7</sup>

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1. See Stephen Labaton, *Decency Ruling Thwarts F.C.C. on Vulgarities*, N.Y. TIMES, June 5, 2007, at A1 (calling the appellate court's decision "a sharp rebuke for the F.C.C. and for the Bush administration"); see Jim Puzzanghera, *FCC Efforts on Indecency Dealt Setback*, L.A. TIMES, June 5, 2007, at C1 (referring to the appellate court's decision as a "strong rebuke" that "repudiated the Federal Communications Commission's recent crackdown on broadcast indecency").

2. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461 (2d Cir. 2007).

3. See Complaints Against Various Broadcast Licensees Regarding the Airing of the "Golden Globe Awards" Program, *Memorandum Opinion and Order*, 19 F.C.C.R. 4975, para. 12, Release No. FCC 04-43 (Mar. 18, 2004), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-04-43A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-04-43A1.pdf) (declaring that "the mere fact that specific words or phrases are not sustained or repeated does not mandate a finding that material that is otherwise patently offensive to the broadcast medium is not indecent," and concluding that "[w]hile prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law."). See generally Clay Calvert, *Bono, the Culture Wars, and a Profane Decision: The FCC's Reversal of Course on Indecency Determinations and Its New Path on Profanity*, 28 SEATTLE U. L. REV. 61 (2004) (analyzing and criticizing the FCC's decision to punish the broadcast of fleeting expletives).

4. *Fox Television Stations*, 489 F.3d at 461.

5. *Id.*

6. See *id.* (writing that the FCC's November 2006 Remand Order, regarding the use of fleeting expletives, in *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 F.C.C.R. 13299, Release No. FCC 06-166 (Nov. 6, 2006) ("provides no reasoned analysis of the purported 'problem' it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable").

7. *Fox Television Stations*, 489 F.3d at 461.

This reasoning certainly supports the appellate court's conclusion that the FCC's sudden policy shift to fining broadcasters for airing fleeting expletives after many years of having tolerated (if not ignored) them<sup>8</sup> is "arbitrary and capricious under the Administrative Procedure Act."<sup>9</sup> But the implications of the court's logic about the lack of evidentiary support for proving harm or injury caused by speech are far more profound and free-speech friendly than their application either to the narrow facts of *Fox Television Stations*<sup>10</sup> or to the FCC's general statutory authority to regulate indecent<sup>11</sup> and profane<sup>12</sup> expression.<sup>13</sup> Indeed, this Article contends that the appellate court's thinking about the government's burden of providing evidence of real harm and actual injury caused by offensive messages on television is equally as applicable to several other current efforts to regulate

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8. See *id.* at 452, 455 (finding that "there is no question that the FCC has changed its policy" and observing that, prior to its 2004 decision declaring a Golden Globe Awards broadcast indecent and profane because of the isolated use of the phrase "really, really fucking brilliant" by U2 singer Bono during an acceptance speech, "the FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime.").

9. *Id.* at 447.

10. The factual scenario centered on challenges to the FCC's determination that two Fox broadcasts, one of the 2002 Billboard Music Awards and the other of the 2003 Billboard Music Awards, were both indecent and profane due to the use of fleeting expletives. See *id.* at 446-54. In the former broadcast, singer Cher stated during an acceptance speech, "People have been telling me I'm on the way out every year, right? So fuck 'em." *Id.* at 452. In the latter broadcast, *Simple Life* reality TV star Nicole Richie queried, "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple." *Id.* Two other FCC decisions, one involving various episodes of ABC's *NYPD Blue* series that involved use of the words "bullshit," "dick," and "dickhead," and the other involving an episode of *The Early Show* on CBS in which a guest used the term "bullshitter," were initially at issue in the case. *Id.* The FCC, however, later dismissed on procedural grounds the complaint against *NYPD Blue* and reversed its finding on *The Early Show*, because it occurred within the context of a bona fide news interview. See *id.* at 453-54.

11. The FCC defines indecent speech "as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." *Pacifica Foundation*, Memorandum Opinion and Order, 56 F.C.C. 2d 94, 98 (1975).

12. The FCC defines profane language as that which is "so grossly offensive to members of the public who actually hear it as to amount to a nuisance." Federal Communications Commission, Consumer Facts: Obscene, Indecent, and Profane Broadcasts, <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last visited Mar. 11, 2008).

13. See 18 U.S.C. § 1464 (2007) (providing that "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.") (emphasis added). See generally B. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 187 (2006) (providing a relatively recent and comprehensive review of the FCC's authority over indecent broadcast expression and its latest indecency rulings).

sexual and/or violent content conveyed on other media. For instance, the same evidentiary problems arise repeatedly today when state and local government entities across the nation attempt to legislatively limit minors' access to video games depicting violent images.<sup>14</sup>

Perhaps more importantly, the Second Circuit's observation regarding the common use of expletives today in society—that "children likely hear this language far more often from other sources"<sup>15</sup>—not only demonstrates the inherent difficulty the government faces on the causation question of parsing out and controlling for factors *other than* media influences that could cause harm, but it suggests an often fatal problem that plagues the regulation of sexual and/or violent content on any specific medium like video games, the Internet, or television. Specifically, the predicament is that such medium-specific laws directed at censorship of a particular type of content<sup>16</sup>—violent or sexual imagery, for example—are almost by definition underinclusive remedies<sup>17</sup> that fail to materially cure or solve whatever problem supposedly exists.<sup>18</sup> For instance, a statute that regulates

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14. See, e.g., *Entm't Software Ass'n v. Hatch*, 443 F. Supp. 2d 1065, 1069, 1070 (D. Minn. 2006) (concluding that the social science evidence offered by Minnesota to support its violent video game statute is "completely insufficient to demonstrate an empirical, causal link between video games and violence in minors," and adding that "[i]t is impossible to determine from the data presented whether violent video games cause violence, or whether violent individuals are attracted to violent video games.").

15. *Fox Television Stations*, 489 F.3d at 461.

16. Content-based laws are subject to the rigorous strict scrutiny standard of judicial review, under which the government must prove both that the law in question is justified by "a compelling interest and is narrowly tailored to achieve that interest." *Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652, 2664 (2007). In determining whether a regulation is narrowly tailored under the strict scrutiny standard, the Supreme Court has observed that "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000).

17. See *City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) ("While surprising at first glance, the notion that a regulation of speech may be impermissibly *underinclusive* is firmly grounded in basic First Amendment principles"); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 58 (1986) (Brennan, J., dissenting) (explaining that while the Supreme Court "frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it," this reasoning "has less force when a classification turns on the subject matter of expression.").

18. For example, Professor Christopher M. Fairman of the Ohio State University Moritz College of Law argues in a recent law journal article that there is:

[A] glaring underinclusiveness with any attempt at speech regulation by the FCC. Its indecency regulations only apply to free, broadcast media. The rise of cable television and satellite radio provide attractive alternatives to broadcast personalities like Howard Stern who want to be free of FCC harassment. Given the dramatic number of new subscriptions to Sirius Satellite Radio – Stern's new media host – the FCC's preoccupation with *fuck* is out of step with the perceptions of millions of Americans. In fact, commentary by the Commissioners themselves identifying increased media tolerance of taboo words as justification for increased FCC vigilance further demonstrates that the Commission is out of touch: most

and limits minors' access to violent video games because such images and plots ostensibly harm the children who play those games fails to cure whatever problem may exist from viewing violence generally because minors still can watch violent images on television<sup>19</sup> and the Internet,<sup>20</sup> in the movies<sup>21</sup> and, for many kids, in the real world (consider, for instance, child abuse, spousal abuse in which a father batters a mother, schoolyard fights and bullying, street crime, brawls during sporting events, etc.).<sup>22</sup> U.S. District Court Judge James J. Brady, in fact, adopted this underinclusiveness line of reasoning when, in August 2006, he enjoined on First Amendment grounds Louisiana's statute "prohibiting and criminalizing the sale, lease or rental of video or computer games that appeal to a minor's morbid interest in violence."<sup>23</sup> Judge Brady, after observing that video games constitute merely "a tiny fraction of the media violence to which modern American children are exposed,"<sup>24</sup> wrote that:

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people are simply not shocked by *fuck* anymore.

Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1747-48 (2007).

19. For instance, in September 2007, the Parents Television Council released a report claiming "that children watching television during the first hour of prime time are assaulted by *violence*, profanity or sexual content once every 3.5 minutes of non-commercial airtime." Press Release, Parents Television Council, PTC Study: Broadcast TV Family Hour Fare Filthier Than Ever, Sept. 5, 2007, available at <http://www.parentstv.org/PTC/publications/release/2007/0905.asp> (emphasis added). The report's executive summary asserts that "[s]ince 2000-2001, violent content during the Family Hour has increased by 52.4%." See Parent's Television Council, *The Alarming Family Hour . . . No Place for Children: A Content Analysis of Sex, Foul Language and Violence During Network Television's Family Hour*, <http://www.parentstv.org/PTC/publications/reports/familyhour/familyhour-92007-finalPDF.pdf> (last visited Mar. 11, 2008).

20. For instance, the beheading of Nicholas Berg, an American kidnapped by Abu Musab al-Zarqawi, was shown "on a tape circulated on the Internet." Edward Wong & James Glanz, *South Korean is Killed in Iraq By His Captors*, N.Y. TIMES, June 23, 2004, at A1. Similarly, the beheading of Eugene "Jack" Armstrong, a kidnapped American contractor, was posted on the Internet. See Steve Fainaru, *Militants in Iraq Release Video of U.S. Captive's Beheading*, WASH. POST, Sept. 21, 2004, at A1. There is nothing, under the law in the United States, that prevents a minor from accessing such morbidly violent tapes on the Internet.

21. See Richard Corliss, *Blood on the Streets*, TIME, Mar. 30, 2007, at 128 (observing that "[k]ids can get violent images from *movies*, TV, DVDs, the Internet") (emphasis added).

22. This, in fact, was a major problem with a Washington state statute limiting minors' access to certain violent video games. In striking down Washington's law, U.S. District Court Judge Robert S. Lasnik called the regulation underinclusive and wrote that it "is too narrow in that it will have no effect on the many other channels through which violent representations are presented to children." Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180, 1189 (W.D. Wash. 2004). He thus concluded that even if Washington was "able to show a causal connection between violent video games and real-life aggression in minors, the record does not support a finding that the Act is likely to curb such aggression in a direct and material way." *Id.*

23. Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823, 825 (M.D. La. 2006).

24. *Id.* at 833.

[T]he [Louisiana] Statute leaves these other media unaffected. Under the Statute, for example, a minor could be legally barred from buying or renting an "M"-rated video game containing violent content, but the same minor could legally buy or rent the movie or book on which the video game was based. Courts have noted that this type of facial underinclusiveness undermines the claim that the regulation materially advances its alleged interests.<sup>25</sup>

The social reality that underlies such judicial logic is that sexual and violent imagery is pervasive today in our popular culture,<sup>26</sup> and laws that single out for censorship particular forms of media—television, video games or the Internet, for instance—that convey such content are simply futile efforts that fail to resolve anything when other media (and culture more generally) are left unregulated. As the late Justice William Brennan pointed out more than two decades ago, when First Amendment interests are at stake, a "one-step-at-a-time analysis [of a problem] is wholly inappropriate."<sup>27</sup> Similarly, current Justice Antonin Scalia has noted that a "law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited."<sup>28</sup>

This Article thus contends that the quandary facing legislators today who want to suppress First Amendment-protected mediated images of sexual<sup>29</sup> and violent conduct<sup>30</sup> is twofold, boiling down to proof of

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25. *Id.* (emphasis added).

26. See SISSELA BOK, MAYHEM: VIOLENCE AS PUBLIC ENTERTAINMENT 4 (1998) (asserting that violent images are "reflected, repeated and echoed in endless variations through the lens of entertainment violence, suffusing movies and TV screens, filling the airwaves, recounted in best-selling novels"); See Pamela Paul, PORNIIFIED: HOW PRONOGRAPHY IS TRANSFORMING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES 4, 5 (2005) (writing that "[t]oday, pornography is so seamlessly integrated into popular culture that embarrassment or surreptitiousness is no longer part of the equation," asserting that "[t]he all-pornography, all-the-time mentality is everywhere in today's pornified culture," and noting that "[p]op music is intimately connected with the pornography industry as today's pop stars embrace and exalt the joys of porn. Eminem, Kid Rock, Blink 182, Metallica, Everclear, and Bon Jovi have all featured porn performers in their music videos."). See also Karen MacPherson, *Is Childhood Becoming Oversexed?*, PITT. POST-GAZETTE, May 8, 2005, at A-1 (describing how "[c]hild development experts worry that such a sex-saturated culture encourages children and young adults to define themselves mainly by how sexy they are, and to see sex as the most important quality in a successful relationship.").

27. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 58 (1986) (Brennan, J., dissenting).

28. *Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring) (citations omitted).

29. Images of sexual conduct deemed by courts to be obscene or child pornography, however, are not protected by the First Amendment. See *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) (providing that "[a]s a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of

causation on two very different levels. First, the government must prove actual harm caused by the speech in question as it is conveyed on a specific medium—not, in other words, the aggregate effect or collective injury from viewing *all* media violence generally—that is sufficient to overcome First Amendment free speech rights.<sup>31</sup> Second, even if sufficient harm and injury from viewing violent or sexual content on a particular medium can be proven by social science research or some other method, the government then must turn around and prove that its legislative remedy—its censorship of the allegedly harmful expression conveyed via a specific medium—actually causes the problem to be reduced, mitigated, or otherwise ameliorated in a significant way.

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speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, *obscenity* and *pornography produced with real children*.”) (emphasis added).

30. Violent imagery is protected by the First Amendment. See *Video Software Dealers Ass’n v. Webster*, 773 F. Supp. 1275, 1278 (W.D. Mo. 1991) (holding that “[u]nlike obscenity, violent expression is protected by the First Amendment.”). Courts refuse to treat it like obscenity, which is not protected by the First Amendment. See, e.g., *James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2000) (writing that “[w]e decline to extend our obscenity jurisprudence to violent, instead of sexually explicit, material.”). What’s more, violent imagery is protected even when it is directed at minors, unless the government can pass the rigorous strict scrutiny standard of judicial review for a limitation imposed upon such content. See *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1045 (N.D. Cal. 2005) (stating that “[t]he prevailing view, and the one this court will follow, is that limitations on a minor’s access to violent expression are subject to strict scrutiny.”). See generally KENT R. MIDDLETON & WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION* 420 (2007) (writing that “American courts have never found that violence alone lacks First Amendment protection. Violence is not included in the definition of obscenity”). To hold that violent imagery was not protected would gut many public libraries and museums of, respectively, famous novels and paintings. As Professor Paul E. Salamanca of the University of Kentucky College of Law observes in a recent article, “excluding violent imagery from the protective ambit of the First Amendment would exclude so much of what we consider classic art and literature that we would be left with only remnants of the western canon.” Paul E. Salamanca, *Video Games as a Protected Form of Expression*, 40 GA. L. REV. 153, 191 (2005). The fact that images of sex and violence may be conveyed for purely entertainment-based purposes does not eliminate or remove First Amendment protection. As the United States Supreme Court has observed, “[e]ntertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.” *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

31. It is important to note here that the speech rights involved in these scenarios include those of both the creators of the speech (the individuals, for instance, who design violent video games) and the recipients of the speech (the users/players of the video games). Thus, in describing the speech interests at stake when enjoining Indianapolis’s violent video game statute in 2001, Judge Richard Posner wrote for a unanimous three-judge block of the United States Court of Appeals for the Seventh Circuit that “[c]hildren have First Amendment rights” and that “the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary. . . .” *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 576, 577 (7th Cir. 2001).



Put more bluntly, two knotty questions now face governmental entities in these circumstances: 1) Proving Harm: Can they prove that a specific form or type of content conveyed on a specific medium actually causes harm, independent of other causal and contributory factors, that is serious enough to overcome constitutional concerns?<sup>32</sup> and 2) Proving Redress: Can they prove that the censorial remedy they adopt actually reduces or remedies the problem in a material way?

The importance of these twin questions cannot be overestimated today. In particular, states across the nation seem fixated on limiting minors' access to violent images and plots in video games,<sup>33</sup> with each effort ultimately proving unconstitutional.<sup>34</sup> The FCC, apparently undaunted and undeterred by such growing judicial precedent against regulating images of violence, wants the government to grant it new authority to regulate images of violence on broadcast, cable, and satellite television,<sup>35</sup> and it believes that "developing an appropriate definition of

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32. For instance, when U.S. District Court Judge Ronald M. Whyte in August 2007 declared unconstitutional California's statute limiting minors' access to violent video games, he explained the first level of the causation quandary, stating:

[T]here has been no showing that violent video games as defined in the Act, *in the absence of other violent media*, cause injury to children. In addition, the evidence does not establish that video games, because of their interactive nature or otherwise, are any more harmful than violent television, movies, internet sites or other speech-related exposures. Although some reputable professional individuals and organizations have expressed particular concern about the interactive nature of video games, there is no generally-accepted study that supports that concern.

Video Software Dealers Ass'n v. Schwarzenegger, 2007 U.S. Dist. LEXIS 57472, \*32 (N.D. Cal. 2007) (emphasis in original).

33. State laws were enjoined by federal courts in the following cases: Video Software Dealers Ass'n v. Schwarzenegger, 2007 U.S. Dist. LEXIS 57472 (N. D. Cal. 2007); Entm't Software Ass'n v. Blagojevich, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); Entm't Software Ass'n v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006); Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006); Entm't Software Ass'n v. Hatch, 443 F. Supp. 2d 1065 (D. Minn. 2006); Entm't Software Ass'n v. Henry, 2006 U.S. Dist. LEXIS 74186 (E.D. Okla. 2006); and Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 1180 (W.D. Wash. 2004). Local laws were enjoined by federal appellate courts in Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) and Am. Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001). See Seth Schiesel, *Courts Block Laws On Game Violence*, N.Y. TIMES, Aug. 21, 2007, at E1 (reporting a federal judge's ruling striking down California's violent video game law in August 2007 and noting how similar laws have been declared unconstitutional in Washington, Illinois, Michigan, Minnesota, Louisiana, and St. Louis County, Missouri.).

34. See generally Clay Calvert & Robert D. Richards, *Violence and Video Games 2006: Legislation and Litigation*, 8 TEX. REV. ENT. & SPORTS L. 49 (2007) (describing and analyzing recent failed efforts of states to limit minors' access to violent video games).

35. See Violent Television Programming and Its Impact on Children, *Report*, MB Docket No. 04-261, para. 5 (Apr. 25, 2007), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/FCC-07-50A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-07-50A1.pdf) (urging that "action should be taken to address violent programming").

excessively violent programming would be possible.”<sup>36</sup> At the same time that it attempts to open up a new front on televised violence, the FCC appears ready to continue its battle on indecent and profane content, regardless of the appellate court’s recent ruling in *Fox Television Stations*.<sup>37</sup>

But it is more than just video game and television media for which governmental entities want to censor sexual or violent expression. For instance, Congress already has made several flawed and failed efforts to regulate minors’ access to non-obscene, sexual content<sup>38</sup> on the Internet.<sup>39</sup>

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36. *Id.* at para. 44.

37. For instance, Kevin J. Martin, chairman of the FCC, responded indignantly to the appellate court’s June 2007 decision in *Fox Television Stations*, declaring in a prepared statement:

I completely disagree with the Court’s ruling and am disappointed for American families. I find it hard to believe that the New York court would tell American families that “shit” and “fuck” are fine to say on broadcast television during the hours when children are most likely to be in the audience.

The court even says the Commission is “divorced from reality.” It is the New York court, not the Commission, that is divorced from reality in concluding that the word “fuck” does not invoke a sexual connotation.

Press Release, Federal Communications Commission, Statement of FCC Chairman Kevin Martin on 2nd Circuit Court of Appeals Indecency Decision (June 4, 2007), available at [http://fjallfoss.fcc.gov/edocs\\_public/attachmatch/DOC-273602A1.pdf](http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-273602A1.pdf).

38. It is important to emphasize the point that the unconstitutional parts of these Internet-based regulatory efforts involved attempts to squelch *non-obscene* speech. Obscene speech falls outside the ambit of First Amendment protection and thus may be regulated without raising the same constitutional concerns and questions. As the United States Supreme Court put it a half-century ago, obscene expression is “not within the area of constitutionally protected speech or press.” *Roth v. United States*, 354 U.S. 476, 485 (1957). The current test for obscenity, which was established by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 24 (1973), focuses on whether the material at issue: 1) appeals to a prurient interest in sex, when taken as a whole and as judged by contemporary community standards from the perspective of the average person; 2) is patently offensive, as defined by state law; and 3) lacks serious literary, artistic, political or scientific value. In contrast, non-obscene sexual content receives First Amendment protection. *Sable Commc’ns v. FCC*, 492 U.S. 115, 126 (1986) (writing that “[s]exual expression which is indecent but not obscene is protected by the First Amendment”).

39. Most recently, U.S. District Court Judge Lowell A. Reed, Jr. issued a permanent injunction in March 2007 preventing enforcement of the Child Online Protection Act (COPA) that “was designed to protect minors from exposure to sexually explicit materials on the Web deemed harmful to them.” *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 779 (E.D. Pa. 2007). The case had previously worked its way up and back down the judicial system for approximately eight years, with the names of three different attorneys general—Janet Reno, John Ashcroft, and Alberto Gonzales—appearing as the captioned defendants along the way. The case first worked its way up to the Supreme Court, after the COPA was enjoined on a preliminary basis in 1999, on the narrow issue of whether the use of the term “community standards” in COPA to identify “material that is harmful to minors” violated the First Amendment. *See ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999) (issuing a preliminary injunction against the COPA), *aff’d*, 217 F.3d 162 (3d Cir. 2000), *vacated and remanded*, 535 U.S. 564 (2002). On remand, the preliminary injunction was affirmed on the grounds that “the ACLU will likely succeed on the merits in establishing that COPA is

All of these medium-specific efforts—targeting media including video games, television, and the Internet—are animated by an alleged (and politically popular) desire to protect children from supposed harms caused by sexual and violent expression, with some members of Congress even calling for tens of millions of dollars in federal appropriations to conduct further research on the potential harms to children from such media content in 2007.<sup>40</sup> The twin questions of first proving harm and then proving redress thus are likely to be repeated again and again in the coming years as legislators keep up their sustained assault on mediated images of sexual and violent content.

The purpose of this Article is not to resolve whether or not social science research can ever definitively prove via empirical evidence actual harm caused by a particular form of mediated content that is sufficient to survive judicial scrutiny.<sup>41</sup> It also is not the Article's goal to question or quibble with the value of the application of communication research and theory to such questions<sup>42</sup> or to reject the idea that communication research

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unconstitutional because it fails strict scrutiny and is overbroad." *ACLU v. Ashcroft*, 322 F.3d 240, 271 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004). F.3d 240, 271 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004). A previous Congressional effort to regulate non-obscene sexually explicit content in cyberspace, adopted in the name of protecting minors, was the Communications Decency Act of 1996, and it too was enjoined as unconstitutional. *Reno v. ACLU*, 521 U.S. 844 (1997)..

40. See Children and Media Research Advancement Act, S. 948, 110th Cong. § 2 (2007) (calling for appropriations of \$10,000,000 for fiscal year 2008; \$15,000,000 for fiscal year 2009; \$20,000,000 for fiscal year 2010; \$25,000,000 for fiscal year 2011; and \$25,000,000 for fiscal year 2012 in order to allow the National Institute of Child Health and Human Development to "examine the role and impact, both positive and negative, of electronic media in children's and adolescents' cognitive, social, emotional, physical, and behavioral development").

41. Even when social scientists acknowledge the failure to prove causation to date when it comes to regulating video games depicting violent images, they still hold out hope for the future. See Rene Weber et al., *Aggression and Violence as Effects of Playing Video Games?*, in *PLAYING VIDEO GAMES: MOTIVES, RESPONSES, AND CONSEQUENCES* 347, 357 (Peter Vorderer & Jennings Bryant eds., 2006) (writing that while "the current scientific evidence on negative consequences of playing violent video games, as well as the confirmed effect sizes, may be insufficient to ban violent video games" and despite acknowledging that "we should not expect violent video games (or other games for that matter) to affect players directly," the authors nonetheless call for funding for more research because of a "pattern of significant, positive, rising and notable effect sizes from diverse best practice studies").

42. See generally Yorgo Pasadeos et al., *Influences on the Media Law Literature: A Divergence of Mass Communication Scholars and Legal Scholars?*, 11 COMM. L. & POL'Y 179, 188 (2006) (discussing mass communication law professors who have applied communication research and theory to legal questions, noting that "[a]s the field evolved, mass communication law scholars also incorporated empirical methodologies into media law studies," and adding that "[m]uch important interdisciplinary work has been done in media law that incorporates empirical methods or concepts from communication theory").

can cast helpful light on legal issues.<sup>43</sup> Professor Alan Garfield of Widener University School of Law, in fact, addressed in an excellent 2005 law journal article both the pros and cons of courts relying on (and requiring) empirical evidence and social science research in attempts to prove harm to minors who watch violent and/or sexual content and thereby to justify censorial legislation.<sup>44</sup> Garfield, in brief, more than adequately explores the problems (and benefits) when courts require empirical proof of harm and the difficulties that legislators face when crafting laws designed to protect children from certain media content, given that “proving a causal connection between speech and children’s emotions or antisocial behavior is not something that lends itself to empirical analysis.”<sup>45</sup>

In addition to not addressing the problems that Professor Garfield more than adequately examines, this Article does not focus on the very real and equally serious problems of the inevitable vagueness challenges, under the well-established void-for-vagueness doctrine,<sup>46</sup> that face legislators when they attempt to craft laws defining violence or sexually indecent content. Indeed, vagueness has been an Achilles’ heel for legislators both when it comes to efforts to limit minors’ access to non-obscene sexual expression in cyberspace<sup>47</sup> and to restrict access to video games depicting violence.<sup>48</sup>

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43. See generally JEREMY COHEN & TIMOTHY GLEASON, *SOCIAL RESEARCH IN COMMUNICATION AND LAW* 15 (1999) (contending there is “an intersection of interests where law is based on behavioral and social assumptions about communication.”).

44. See Alan E. Garfield, *Protecting Children From Speech*, 57 FLA. L. REV. 565, 608-15 (2005) (discussing the use of social science research to prove harm to minors caused by viewing media content and analyzing how courts use and consider that evidence (or lack thereof) in their rulings on the constitutionality of statutes designed to shield children from that media content).

45. *Id.* at 608-09. Garfield points out the danger in having judges require a finding of causal proof of harm from speech where minors are concerned, noting that the sheer “difficulty of proving a definitive causal connection between speech and harm should give courts pause before invalidating child-protection censorship legislation for lack of empirical proof.” *Id.* at 610.

46. See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (providing, in pertinent part, that “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined” and that “we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.”). See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 910 (2d ed. 2002) (writing that “a law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. Unduly vague laws violate due process whether or not speech is regulated”).

47. See *ACLU v. Gonzales*, 478 F. Supp. 2d 775, 778 (E.D. Pa. 2007) (concluding, among other things, that the Child Online Protection Act “is impermissibly vague”).

48. See *Entm’t Software Ass’n v. Foti*, 451 F. Supp. 2d 823, 835-36 (M.D. La. 2006) (writing that a statute “aimed at protecting minors” from violent content “must be clearly drawn with standards that are reasonably precise,” and finding Louisiana’s video game statute unconstitutionally vague because it “fails to provide specific definitions of prohibited

This Article, instead, focuses in Part II on the comparatively underexplored implications of the second step, identified earlier as “proving redress,” of what this Article calls the two-step evidentiary and causation quandary facing medium-specific laws. This Part, in particular, lays out the major problem of underinclusion that arises with this step. Then, in Part III, this Article explores the broader puzzle of precisely how much evidence and what kind of evidence must be demonstrated by legislative bodies in order to satisfy courts that the problems medium-specific laws are designed to address are, in fact, remedied to a material degree. In brief, how does the government actually prove that redress has occurred or will occur? Ultimately, if courts continue to employ this two-step evidentiary and causation mode of judicial analysis, this Article argues and concludes in Part IV that it will be nearly impossible for any medium-specific effort to restrict minors’ access to sexual and/or violent speech ever to pass constitutional muster.

## II. PROVING REMEDY AND REDRESS OF SPEECH-CAUSED HARM THROUGH CENSORSHIP: CAUGHT BETWEEN UNDERINCLUSIVE REMEDIES AND OVERBROAD LAWS

Back in 2003, when the United States Court of Appeals for the Eighth Circuit declared unconstitutional a St. Louis County, Missouri ordinance that limited minors’ access to so-called “graphically violent video games,”<sup>49</sup> it wrote that the County had the burden of proving “that the recited harms are real, not merely conjectural, and that *the regulation will in fact alleviate these harms in a direct and material way.*”<sup>50</sup> While the initial part of this quotation about the reality of recited harms relates to the first step of the two-step evidentiary and causation quandary spelled out in Part I, the emphasized (italicized) second part taps directly into the second step in which the government must prove that its remedy of censorship actually works in alleviating the problem.

Importantly, the Eighth Circuit was not making up or creating this evidentiary rule on its own. It was, in fact, borrowing the language directly from the Supreme Court’s 1994 opinion in *Turner Broadcasting System v. FCC*<sup>51</sup> involving the constitutionality of the FCC’s must-carry rules that

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conduct: many of its terms, such as ‘morbid interest,’ have no clear meaning; and there is no explanation of crucial terms such as ‘violence.’ Consequently, video producers and retailers will be forced to guess at the meaning and scope of the Statute . . .”).

49. *Interactive Digital Software Ass’n v. St. Louis County, Mo.*, 329 F.3d 954, 956 (8th Cir. 2003).

50. *Id.* at 958 (quoting *Turner Brdcst. Sys. v. FCC*, 512 U.S. 622, 664 (1994)) (emphasis added).

51. 512 U.S. 622 (1994).

required cable system operators to carry free, over-the-air broadcast channels.<sup>52</sup>

Similarly, this evidentiary judicial reasoning about proving the effectiveness and efficacy of censorship-based remedies pervades the rulings of the Supreme Court in the area of commercial speech,<sup>53</sup> in which it has stated that “a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that *its restriction will in fact alleviate them to a material degree.*”<sup>54</sup> Under the four-pronged test for determining whether a restriction on commercial speech is constitutional, articulated more than a quarter-century ago by the Supreme Court in *Central Hudson Gas & Electric Co. v. Public Service Commission*,<sup>55</sup> one of the burdens that the government must prove is “whether the regulation directly advances the governmental interest asserted.”<sup>56</sup> It is here where the government must put forth real evidence—as the Supreme Court has written, “[t]his burden is not satisfied by mere *speculation or conjecture*”<sup>57</sup>—that the problem in question will be remedied and alleviated to a material degree.

This standard of proof recently was applied by then-Judge Samuel A. Alito of the United States Court of Appeals for the Third Circuit in striking down a Pennsylvania statute known as Act 199 that prohibited, in the name of stopping abusive and underage drinking, the advertising of prices of alcoholic beverages in college newspapers.<sup>58</sup> Writing for a unanimous appellate panel in *Pitt News v. Pappert*, Alito observed that “[i]n contending that underage and abusive drinking will fall if alcoholic beverage ads are eliminated from just those media affiliated with educational institutions, the Commonwealth relies on nothing more than ‘speculation’ and ‘conjecture.’”<sup>59</sup> Quoting from Supreme Court precedent, Alito added that “the Commonwealth has not shown that [Act 199] combats underage or abusive drinking ‘to a material degree,’ or that the law

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52. See *id.* at 664.

53. See DONALD E. LIVELY ET AL., FIRST AMENDMENT LAW: CASES, COMPARATIVE PERSPECTIVES, AND DIALOGUES 201-27 (2003) (discussing the commercial speech doctrine and noting, among other things, that “commercial speech, or speech which proposes a commercial transaction” has “traditionally received less First Amendment protection” than other forms of expression such as political speech); Russell L. Weaver & Donald E. Lively, UNDERSTANDING THE FIRST AMENDMENT 74-84 (2003) (providing an overview of the commercial speech doctrine).

54. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (emphasis added).

55. 447 U.S. 557 (1980).

56. *Id.* at 566.

57. *Edenfield*, 507 U.S. at 770 (emphasis added).

58. *Pitt News v. Pappert*, 379 F.3d 96 (3d Cir. 2004).

59. *Id.* at 107-08.

provides anything more than 'ineffective or remote support for the government's purposes.'"<sup>60</sup>

Akin to the laws that are the focus of this Article—medium-specific regulations (i.e., regulations that target a specific medium like television or video games) that single out a particular type of content conveyed on that medium (i.e., violent images and storylines)—the Pennsylvania statute at issue in *Pitt News v. Pappert* also was a medium-specific statute that focused on a specific form of content conveyed on that medium. This is relevant because, in determining that the censorial remedy of Act 199 failed to materially alleviate problems of underage and abusive drinking, Judge Alito emphasized the wide variety of sources *other than* college newspapers where students could still learn about the prices of alcohol. Alito wrote that Act 199:

[A]pplies only to advertising in a very narrow sector of the media (i.e., media associated with educational institutions), and the Commonwealth has not pointed to any evidence that eliminating ads in this narrow sector will do any good. Even if Pitt students do not see alcoholic beverage ads in *The Pitt News*, they will still be exposed to a torrent of beer ads on television and the radio, and they will still see alcoholic beverage ads in other publications, including the other free weekly Pittsburgh papers that are displayed on campus together with *The Pitt News*.<sup>61</sup>

This is precisely the same type of underinclusiveness problem that plagues laws that single out one medium (television, for example) for conveying content such as violent imagery but that leave unregulated and unlegislated other varieties of media (movies, video games, and the Internet) to transmit the same content. In brief, there simply are many other media sources available for delivering the exact same or very similar brand of content, be it the prices of alcoholic beverages at the local college bars or the graphic images of fictional and/or real-life violence, that go unchecked by statutory regulation.

Judge Richard Posner recognized this trouble more than a half-decade ago in *American Amusement Machine Association v. Kendrick*,<sup>62</sup> the first case to reach the federal appellate court level involving a statute that attempted to limit minors' access to violent video games. In this case, Indianapolis was concerned "with the welfare of the game-playing children themselves, and not just the welfare of their potential victims."<sup>63</sup> To address these concerns, the city adopted an ordinance in 2000 that forbade:

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60. *Id.* at 107 (quoting *Florida Bar v. Went For It, Inc.*, 515, U.S. 618, 624 (1995); *Edenfield*, 507 U.S. at 770).

61. *Pitt News*, 379 F.3d at 107.

62. 244 F.3d 572 (7th Cir. 2001).

63. *Id.* at 576.

[A]ny operator of five or more video-game machines in one place to allow a minor unaccompanied by a parent, guardian, or other custodian to use 'an amusement machine that is harmful to minors,' requires appropriate warning signs, and requires that such machines be separated by a partition from the other machines in the location and that their viewing areas be concealed from persons who are on the other side of the partition.<sup>64</sup>

Unpacking this language, it becomes clear that the reach of the Indianapolis ordinance extended only to video game *arcades*, and not to either public sale at retail stores of video games or to their private use at home. More significantly, it only applied to violent imagery conveyed on one medium—"an amusement machine."<sup>65</sup> It was, in other words, a medium-specific remedy involving a specific category of content (content that, according to the language adopted by Indianapolis, "predominantly appeals to minors' morbid interest in violence"<sup>66</sup>). Judge Posner explained the under-inclusiveness failures of such a remedy to the problems allegedly addressed by the Indianapolis law, reasoning that "[v]iolent video games played in public places are *a tiny fraction of the media violence* to which modern American children are exposed."<sup>67</sup> Writing for a unanimous appellate court, Posner observed that Indianapolis failed to argue that "the *addition* of violent video games to violent movies and television in the cultural menu of Indianapolis youth significantly increases whatever dangers media depictions of violence pose to healthy character formation or peaceable, law-abiding behavior."<sup>68</sup> The social science studies introduced by Indianapolis to show harm, Posner noted, "are *not* evidence that violent video games are any more harmful to the consumer or to the public safety than violent movies or other violent, but passive, entertainments."<sup>69</sup>

In brief, a statute targeting the consumption of violent imagery in video games cannot materially remedy whatever alleged problems exist for the consumption of mediated images of violence in general. This is a problem because, as one federal appellate court recently observed, the "Supreme Court has looked skeptically on statutes that exempt certain speech from regulation, where the exempted speech implicates the very same concerns as the regulated speech."<sup>70</sup> Importantly, other courts considering the issue have adopted and quoted Judge Posner's observation,

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64. *Id.* at 573.

65. *Id.*

66. *Id.*

67. *Id.* at 579 (emphasis added).

68. *Id.*

69. *Id.*

70. Chaker v. Crogan, 428 F.3d 1215, 1227 (9th Cir. 2005).



as U.S. District Court Judge James J. Brady did when he wrote, in striking down Louisiana's video game law in 2006, that "violent video games are only 'a tiny fraction of the media violence to which modern American children are exposed.'"<sup>71</sup> As described earlier, this led Brady to conclude that the law was underinclusive.

What lesson, then, can one take away from this? That just as it is extraordinarily difficult for a legislative body to demonstrate, on the first step of the two-step evidentiary and causation process described in Part I, that a particular type of content conveyed on a specific medium, standing alone and independent of the effects of the same content conveyed on all other media, causes injury,<sup>72</sup> it is arguably even more difficult for a legislative body to prove that eliminating the conveyance of that content on a single medium does any good, much less materially alleviates and remedies the problem.

It is helpful, perhaps, to understand this redress-and-remedy problem by considering it on a much smaller, micro-level scale: the elimination of a particular media product (a specific video game, a specific movie title, or a specific television program) when other products within that medium convey similar content and are left to circulate in the marketplace of ideas.<sup>73</sup> In particular, Professor Arnold H. Loewy of the University of North Carolina at Chapel Hill School of Law observed, in a recent law journal article calling for the end of obscenity law as we know it, that:

It is extremely doubtful that the actual obscenity of a particular book or movie makes any difference at all in regard to our concern for community environment, protecting children, or protecting unwilling adults. If a particular movie theater is showing a sexually-explicit film that a jury has just declared to be non-obscene, it is likely to have very nearly the same deleterious effects as last week's sexually-explicit film which had been declared obscene.<sup>74</sup>

Likewise, even if the FCC is able to crack down, through its indecency power, on the proliferation of sexual imagery on over-the-air broadcast television programming, it currently lacks the statutory authority to censor such expression on cable television. Significantly, in 2007 several new cable series—*Tell Me You Love Me*<sup>75</sup> and *Californication*<sup>76</sup>—were

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71. *Entm't Software Ass'n v. Foti*, 451 F. Supp. 2d 823, 833 (M.D. La. 2006).

72. No court, for instance, has found that video game violence alone causes injury. See *supra* note 32 (describing Judge Whyte's reasoning to this effect in *Video Software Dealers Ass'n v. Schwarzenegger*, 2007 U.S. Dist. LEXIS 57472, \*32 (N.D. Cal. 2007)).

73. See RODNEY SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6-8 (1992) (discussing the marketplace of ideas metaphor).

74. Arnold H. Loewy, *Obscenity: An Outdated Concept for the Twenty-First Century*, 10 NEXUS J. OP. 21, 25 (2005).

75. This show has been described as having "the most graphic sex scenes ever presented in a serious TV drama." Doug Elfman, *Couples Work Out 'Love' Issues*, CHI. SUN

“cranking their sex scenes up a notch, daring to bare more skin than viewers have been accustomed to seeing.”<sup>77</sup> Thus, as with regulation of violence on the medium of video games, the regulation of indecency on the medium of television is plagued by the problem of underinclusion.<sup>78</sup> Making a dent in (much less rolling back) the reality of a sexualized culture—one spawned in part by “adult erotica moving onto Main Street America by the mid 1990s”<sup>79</sup> and one in which children are arguably increasingly sexualized<sup>80</sup> and influenced by the likes of Britney Spears<sup>81</sup>—

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TIMES, Sept. 8, 2007, at 12. Television critic Tom Shales observed that the “sex scenes are, indeed, unusually explicit and include both male and female frontal nudity (with some use of prostheses), and though at first blush viewers might feel there are lulls between close encounters, the sex scenes soon seem seamlessly integrated, as well as strikingly intimate.” Tom Shales, *Steamy and Stimulating*, WASH. POST, Sept. 8, 2007, at C1.

76. See Chris Pursell, *Racy ‘Californication’ Selling Well Overseas*, TELEVISION WK., Aug. 20, 2007, at 8 (describing *Californication*, starring David Duchovny, and noting “the nudity, language and edgy nature of the new show about a self-destructive novelist.”).

77. Stephen Battaglio, *Steamy Shows Stir Controversy*, TV GUIDE, Aug. 20, 2007, at 8, available at <http://www.tvguide.com/news/xxx-sex-tv/070817-02>.

78. See Fairman, *supra* note 17 and accompanying text (describing this underinclusiveness problem with the FCC’s regulation of indecency).

79. Gloria Goodale, *This Fall’s TV Season is Rated X*, CHRISTIAN SCI. MONITOR, Sept. 7, 2007, at 11 (citing KEVIN SCOTT, *THE PORNING OF AMERICA: CHOOSING OUR SEXUAL FUTURE* (forthcoming)).

80. See generally AMERICAN PSYCHOLOGICAL ASS’N, REPORT OF THE APA TASK FORCE ON THE SEXUALIZATION OF GIRLS (2007), <http://www.apa.org/pi/wpo/sexualizationrep.pdf>. See also, Sharon Jayson, *Are Girls Becoming ‘Sexualized Images’?; Group Sees Risk To Mental Health*, USA TODAY, Feb. 20, 2007, at 5D (discussing the Report, which focuses on “a variety of media, from television and movies to song lyrics, and examined advertising showing body-baring doll clothes for preschoolers, tweens posing in suggestive ways in magazines and the sexual antics of young celebrity role models,” and which defines “sexualization” as transpiring “when a person’s value comes only from her/his sexual appeal or behavior, to the exclusion of other characteristics, and when a person is sexually objectified, e.g., made into a thing for another’s sexual use”); Press Release, American Psychological Ass’n, Sexualization of Girls is Linked to Common Mental Health Problems in Girls and Women—Eating Disorders, Low Self-Esteem, and Depression; An APA Task Force Reports, Feb. 19, 2007, available at <http://www.apa.org/releases/sexualization.html> (stating that the Report found the “sexualization of girls in all forms of media including visual media and other forms of media such as music lyrics abound” and that the Report concluded “the proliferation of sexualized images of girls and young women in advertising, merchandising, and media is harmful to girls’ self-image and healthy development” (internal quotations omitted)).

81. Spears recently appeared on MTV “dressing like a lingerie model as she dirty-danced with the requisite army of male companions while lip-syncing through her first single, ‘Gimme More,’ a relatively tuneless attempt at a sexy come-on . . .” Jim DeRogatis, *Rihanna Rises Above Brit’s Sad Comeback*, CHI. SUN TIMES, Sept. 10, 2007, at 44. Cf. Clay Calvert & Robert D. Richards, *Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. L. 255, 291 (2006) (quoting leading adult movie star Stormy Daniels for the proposition that adult entertainment has mainstreamed in the United States due, in part, to “MTV and Britney Spears. She was dancing on stage in outfits that I wouldn’t wear on stage.”).

is simply beyond the FCC's ability to address with a medium-specific law. Even if, for instance, the FCC could today limit the dissemination of sexually suggestive and/or graphic lyrics on terrestrial radio with indecency rules that force stations to play, during non-safe-harbor hours,<sup>82</sup> the so-called radio edit versions<sup>83</sup> of songs, like Avril Lavigne's 2007 hit "Girlfriend,"<sup>84</sup> in which some words are bleeped out, a minor who somehow could not figure out just what was being said (a seemingly simple task with many songs) can easily find both the text of the unedited song lyrics and the artist's performance of the unedited song on the Internet and easily download the latter to a computer or iPod.<sup>85</sup>

The central problem, then, is this: medium-specific, content-based laws aimed at sexual and/or violent expression are, almost inevitably, underinclusive remedies that fail to materially alleviate the supposed problems and social ills they are designed to address. This does not mean, however, that these laws are inevitably unconstitutional. Why? Because as the United States Court of Appeals for the Ninth Circuit recently observed, "there is no general First Amendment prohibition on the under-inclusive regulation of speech."<sup>86</sup> The United States Court of Appeals for the Tenth Circuit has similarly observed, in considering the concept of

82. The FCC defines the safe-harbor period as "the time period between 10 p.m. and 6 a.m., local time. During this time period, a station may air indecent and/or profane material." Federal Communications Commission, Obscenity, Indecency & Profanity - Frequently Asked Questions, <http://www.fcc.gov/eb/oip/FAQ.html> (last visited Mar. 11, 2008).

83. See *Citadel Broadcasting Company*, Memorandum Opinion and Order 17 F.C.C.R. 483, paras. 2,3 (2002) (using the term "'radio edit' version" to describe an edited version of the Eminem song *The Real Slim Shady* intended for radio airplay).

84. The song is "about a woman who tells a guy to make his loser girlfriend disappear so she can show him what good sex is really like. Or as she sneers: 'In a second, you'll be wrapped around my finger, cause I can do it better!'" David Brooks, *New Breed of Tough Loners*, TIMES UNION, July 10, 2007, at A9. It has been described as "a perfect example of radio excess: A kind-of-catchy Toni Basil rip-off tops the charts and removes any shred of anti-establishment cred from an otherwise-mainstream teen superstar, forcing us, eventually, to turn the dial (until we start liking it again in a few weeks)." Kevin Joy, *Ear-Itating: Grating Songs Make Us Wonder Why They Were Ever Popular*, COLUMBUS DISPATCH, July 10, 2007, at 8D. Despite such negative critiques, it hit number one on the Billboard charts. See, e.g., *'Girlfriend' Takes the Top Spot on Billboard's Music Chart This Week*, CHATTANOOGA TIMES FREE PRESS, May 2, 2007, at E5 (listing the song as the number one single on the "Billboard hot 100").

85. The unedited lyrics to Avril Lavigne's hit song *Girlfriend* include the Canadian pop star singing, "Don't pretend, I think you know I'm damn precious, And hell yeah, I'm the motherfucking princess." While the word "fucking" is partially obscured on radio airplay on many stations, the complete and unedited version of the lyrics are easily found online. See CompleteAlbumLyrics.Com, Avril Lavigne—Girlfriend Lyrics, <http://www.completealbumlyrics.com/lyric/131233/Avril+Lavigne+Girlfriend.html> (last visited Mar. 11, 2008); AZLyrics.Com, Avril Lavigne Lyrics - Girlfriend, <http://www.azlyrics.com/lyrics/avrilavigne/girlfriend.html> (last visited Mar. 11, 2008).

86. *Chaker v. Crogan*, 428 F.3d 1215, 1227 (9th Cir. 2005).

underinclusiveness in the context of the constitutionality of the federal do-not-call registry, that “the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front.”<sup>87</sup>

Similarly, another federal appellate court—the Fourth Circuit—opined in 2005 that:

The concept of underinclusiveness needs to be approached with some caution, however. Holding an underinclusive classification to violate the First Amendment can chase government into overbroad restraints of speech. Thus, a speech restriction with a limited reach is not doomed to fail First Amendment scrutiny.<sup>88</sup>

All of these opinions suggest that courts do possess at least some leeway in terms of allowing incremental legislative tactics and approaches—approaches that, for instance, initially regulate a particular type of content on one medium and then gradually expand the approach across other media—when addressing larger social problems allegedly caused by consumption of media content. In particular, the Fourth Circuit’s contention that judicial overemphasis of underinclusiveness “can chase government into overbroad restraints of speech”<sup>89</sup> shows the potential Catch-22 nature of the situation facing legislative bodies. A law that is too limited in reach can be deemed underinclusive, but a law that sweeps up too much content may be deemed overbroad and thus unconstitutional. In particular, as the Supreme Court observed in 2002 when striking down portions of the Child Pornography Prevention Act of 1996 that extended “the federal prohibition against child pornography to sexually explicit images that appear to depict minors but were produced without using any real children,”<sup>90</sup> the “Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.”<sup>91</sup> A law is overbroad, the Supreme Court noted at the time, “if it prohibits a substantial amount of protected expression.”<sup>92</sup> The concern underlying the overbreadth doctrine, as Justice Scalia recently wrote, is “that the threat of enforcement of an overbroad law may deter or ‘chill’ constitutionally protected speech.”<sup>93</sup> Under the overbreadth doctrine,

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87. *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1238 (10th Cir. 2004).

88. *Nat’l Fed’n of Blind v. FTC*, 420 F.3d 331, 345 (4th Cir. 2005).

89. *Id.*

90. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 239 (2002).

91. *Id.* at 244.

92. *Id.*

93. *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

which allows a facial challenge to a statute,<sup>94</sup> the Supreme Court has held that:

[T]he showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," suffices to invalidate *all* enforcement of that law "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."<sup>95</sup>

If courts like those that have struck down laws targeting violent images in video games continue to vigorously consider the underinclusive nature of the remedy provided by such statutes, then legislators are arguably boxed in by and between the inclusiveness and overbreadth doctrines. In a nutshell, they are damned if they do too little to address, through censorship-based legislation, the harms allegedly caused by viewing sexual and violent content, and they are damned if they do too much and draft vastly sweeping laws that cut across media (intermedia laws, as compared to an intramedium approach) or that too expansively define the allegedly harmful material they attempt to regulate.

### III. THE BROADER PROBLEM OF PROVING REDRESS OF HARMS: WHAT—AND HOW MUCH—EVIDENCE WILL SUFFICE?

As Part II illustrates, courts have made it abundantly clear in recent years that governmental entities that curb speech in the name of curing supposed ills and harms caused by that same expression must demonstrate that their medium-specific laws "will in fact alleviate these harms in a direct and material way."<sup>96</sup>

What, however, they have failed to make clear is just how this evidentiary burden is to be satisfied by those governmental entities. Although legislative bodies know from the U.S. Supreme Court that "mere *speculation* or *conjecture*"<sup>97</sup> of redress won't suffice, there is little substantive or tangible guidance beyond such vagaries.

The unresolved question thus is: What evidence does it take, in court, for the government to prove the efficacy of its medium-specific legislative responses to harm allegedly caused by watching, hearing, and otherwise consuming sexual or violent media content?

The difficulty of demonstrating the effectiveness of a medium-specific law is immense. Consider, for instance, a law limiting minors'

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94. See generally *LIVELY ET AL*, *supra* note 56, at 85-86 (describing the concept of facial challenges to statutes on grounds of both vagueness and overbreadth).

95. *Virginia v. Hicks*, 539 U.S. at 118-19 (2003) (citations omitted).

96. *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 329 F.3d 954, 956 (8th Cir. 2003).

97. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

access to video games that depict violence. Would a long-term, correlational study showing a drop in childhood “aggressiveness”—however that term might be defined, let alone in the language that a judge, *not* a social scientist, could tolerate sufficiently to escape vagueness issues—in a specific state, subsequent to the passage and after the adoption of such a law in that state, cut the legal muster in terms of proof?<sup>98</sup> How significant, statistical or otherwise, would the drop need to be in order to withstand judicial review? How would researchers control for, in such a complex real-world setting, other variables that also might contribute to or correlate with any drop that might be demonstrated? The questions go on and on.

Of course, it would likely be impossible to even conduct such long-term studies on the effectiveness of a regulation like this. Why? Because just as soon as the law were to take effect, the Entertainment Software Association<sup>99</sup> and similar trade associations representing the video game industry<sup>100</sup> would immediately seek a temporary restraining order

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98. Even if a correlation is ever found between the implementation of a law restricting minors’ access to violent video games and a drop in crime, it must be emphasized correlations “do *not* necessarily indicate a causal relationship.” David H. Weaver, *Basic Statistical Tools*, in *MASS COMMUNICATION RESEARCH AND THEORY* 147, 161 (Guido H. Stempel, III et al. eds., 2003). In order to prove actual causality:

we [must] be able to establish that the correlation between our variables is nonspurious (that it holds even when we control for as many other factors as possible), but also that the cause preceded the effect in time and that there is a plausible rationale for why one variable should be a cause of another. Even if all these conditions are met, a causal relationship cannot be proven by one study. *Id*

99. This organization describes itself on its Web site as:

[T]he U.S. association exclusively dedicated to serving the business and public affairs needs of companies that publish video and computer games for video game consoles, personal computers, and the Internet. ESA members collectively account for more than 90 percent of the \$7.4 billion in entertainment software sold in the U.S. in 2006, and billions more in export sales of U.S.-made entertainment software.

Entertainment Software Association, About the Entertainment Software Association, <http://www.theesa.com/about/index.php> (last visited Mar. 11, 2008).

100. Another leading trade association related to the video game industry is the Entertainment Merchants Association, which describes itself on its Web site as:

[T]he not-for-profit international trade association dedicated to advancing the interests of the \$33 billion home entertainment industry. EMA represents approximately 600 companies throughout the United States, Canada, and other nations. Its members operate approximately 20,000 retail outlets in the U.S. that sell and/or rent DVDs and computer and console video games and digitally distributed versions of these products. Membership comprises the full spectrum of retailers (from single-store specialists to multi-line mass merchants, and both brick and mortar and online stores), distributors, the home video divisions of major and independent motion picture studios, and other related businesses that constitute and support the home entertainment industry. EMA was established in April 2006 through the merger of the Video Software Dealers Association (VSDA) and the Interactive Entertainment Merchants Association (IEMA).

(followed, of course, by requests for both preliminary and permanent injunctions) stopping its enforcement. Given that courts have again and again granted such injunctions, there never would be any opportunity to even test the effectiveness of the law.<sup>101</sup> Much like the Catch-22 between underinclusive remedies and overbroad laws discussed in Part II, the predicament here is: How can one test the effectiveness of a law if the law is never given the chance to go into effect in the first place? One is left, in such a situation, with little more than the very same "speculation"<sup>102</sup> and "conjecture"<sup>103</sup> that courts have not tolerated.

In declaring unconstitutional the video game statute adopted by Indianapolis, Judge Richard Posner wrote for the United States Court of Appeals for the Seventh Circuit that, when it comes to proving harm (the first step of the two-step evidentiary and causation quandary set forth in the Introduction), "[w]e need not speculate on what evidence might be offered . . . [to] bring the ordinance into conformity with First Amendment principles."<sup>104</sup> In this vein, it is disappointing that, when it comes to the second step of this evidentiary process, courts have not "speculated" more about what evidence will suffice to prove the efficacy of a legislative remedy censoring sexual or violent content on a particular medium.

Experimental research evidence, in particular, would be nearly impossible to generate. There does not exist, of course, an experimental research laboratory at some university for testing the efficacy of laws on a group of college-aged sophomores (an irrelevant group to start with if the FCC and states are concerned with the effects of speech on minors, not adults) earning extra credit for their not-so-voluntary participation in the study! Social science experimentation, in brief, simply does not provide the means to an answer on this legal question whether a medium-specific law remedies a harm supposedly caused by speech.

It is worth returning on this point to the start of this Article and the Second Circuit's observation that the FCC failed to provide evidence to demonstrate that its ban on the broadcast of fleeting expletives would "remedy"<sup>105</sup> whatever problem such isolated use of curse words might have on children.<sup>106</sup> Would lack of exposure to a fleeting expletive on a TV program really improve a child's long-term development, when compared

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Entertainment Merchants Association, About EMA, [http://www.entmerch.org/about\\_ema.html](http://www.entmerch.org/about_ema.html) (last visited Mar. 11, 2008).

101. See cases cited *supra* note 33.

102. *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

103. *Id.*

104. *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

105. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444, 461 (2d Cir. 2007).

106. See *supra* notes 2-7 and accompanying text.

to children who were exposed to such language on a TV program? No university would ever allow an experiment that randomly divided a collection of local elementary school children into two groups, subjecting one group of kids in the so-called “experimental group”<sup>107</sup> to exposure to a TV program that contained an isolated and fleeting utterance of an expletive like “fuck,” while the remainder of kids, placed in the “control group,”<sup>108</sup> watched the exact same program minus the fleeting expletive.<sup>109</sup> Not only would it be impossible to prove, in the long term, that the children who did *not* hear the word were somehow better off or less harmed than those who were not exposed to it (the result the FCC would like to demonstrate), but it would be preposterous to believe that any university’s institutional review board would allow an experiment to take place that intentionally exposed young children to offensive language that (according to the FCC) would harm them.<sup>110</sup> As this illustrates, social science experiments simply are irrelevant in proving the benefits the FCC seeks through censorship of fleeting expletives.

Social scientists often search, through both experimental and survey research, for potential harms related to or caused by exposure to media messages, such as the viewing by children of television or video game violence.<sup>111</sup> But on the question of *remedy* through censorship—not of *harm* caused by speech—useful experiments are impossible to conduct.

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107. LISA J. MCINTYRE, *NEED TO KNOW: SOCIAL SCIENCE RESEARCH METHODS* 296 (2005) (defining an experimental group as one that includes “subjects who receive the experimental treatment. This is sometimes referred to as “treatment group”).

108. *Id.* at 295 (defining a control group as being comprised of “research subjects who are similar in relevant characteristics to members of the experimental group but who receive no treatment”).

109. Such a structure would mirror that of a standard controlled experiment. As Professor Lawrence R. Frey and his co-authors write, “experiments typically involve various *conditions* or *groups* that receive differential exposure to the independent variable. The most basic procedure is to divide research participants into two conditions, one that receives a manipulation (called a *treatment* or *experimental group*) and one that does not (the *control group*).” LAWRENCE R. FREY ET AL., *INVESTIGATING COMMUNICATION: AN INTRODUCTION TO RESEARCH METHODS* 171 (2000) (emphasis in original).

110. *See id.* at 147 (discussing the role of institutional review boards and emphasizing that “an IRB’s greatest concern is to ensure that the research study does not cause any undue harm or hardship to the people participating in the study”).

111. *See, e.g.,* JENNINGS BRYANT & SUSAN THOMPSON, *FUNDAMENTALS OF MEDIA EFFECTS* 172 (2002) (observing that numerous “studies examine viewers’ exposure to such violence and attempt to answer the difficult question: What effect does media violence have on those who consume it?” and that “[r]esearch studies on the effects of viewing violent media fare have employed a number of different methodologies,” including “laboratory experiments, field experiments, correlational surveys, longitudinal panel studies, natural experiments and intervention studies”); John L. Sherry, *Violent Video Games and Aggression: Why Can’t We Find Effects*, in *MASS MEDIA EFFECTS RESEARCH: ADVANCES THROUGH META-ANALYSIS* 245 (Raymond W. Preiss et al. eds., 2007) (describing efforts by social scientists to locate effects caused by playing violent video games).



Correlational surveys, in turn, are worthless when trying to prove in court a cure or remedy, caused by a censorship-based statute, of supposed harms because "they are ultimately unable to demonstrate a *causal relationship* with any degree of certainty."<sup>112</sup>

In the end, the problem of proving the effectiveness of medium-specific, censorship-based statutes designed to mitigate the alleged harms caused by viewing mediated images of sexual and violent content seems intractable, unless courts are willing to waive, in the name of protecting minors, the requirement of submitting substantial evidence that the remedies will, in fact, directly and materially alleviate the supposed injuries. Real-world data is impossible to gather because the laws in question are quickly enjoined before they can be implemented,<sup>113</sup> while experimental research data that is generalizable<sup>114</sup> to real-world settings cannot be generated.

#### IV. TOO LITTLE, TOO LATE? A CALL FOR THE END OF THE MEDIUM-SPECIFIC REMEDY

"[T]he rich and the privileged have always had their leather-bounded issues of pornography. But today the local video store and newsstand have become the poor man's art museum. And now, when we move into this era of wireless communication, the genie's out of the bottle."<sup>115</sup>

As much as some people might hate to acknowledge or to admit it, perhaps *Hustler* publisher Larry Flynt is correct when he says "the genie's out of the bottle" in the age of wireless communication.<sup>116</sup> Sexual and violent expression, be it in the form of images or words, proliferates

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112. BRYANT & THOMPSON, *supra* note 118, at 173 (emphasis added).

113. See cases cited *supra* note 33 (describing how laws limiting minors' access to violent video games are consistently enjoined by courts).

114. In the parlance of social scientists, generalizability is referred to as external validity, a term that "describes our ability to generalize from the results of a research study to the real world." JAMES H. WATT & SIEF A. VAN DEN BERG, RESEARCH METHODS FOR COMMUNICATION SCIENCE 59 (1995). The problem with controlled experiments is that the study may take place in "an artificial situation in which any generalization to the real world is difficult to justify." *Id.*

115. Clay Calvert & Robert Richards, *Larry Flynt Uncensored: A Dialogue With the Most Controversial Figure in First Amendment Jurisprudence*, 9 COMM'LAW CONSPECTUS 159, 167 (2001).

116. *Id.* Flynt's sentiment about the proliferation of sexual content was echoed recently by Joy King, "the woman at Wicked Pictures who helped turn Jenna Jameson into one of the most recognizable names in the adult industry today." Clay Calvert & Robert D. Richards, *Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. L. 255, 266 (2006). As King told the author of this article and a colleague during a 2006 interview about the adult entertainment industry, "I don't think the industry is ever going to go away. The genie is out of the bottle. It's not leaving any time soon." *Id.* at 296.

everywhere in our culture.<sup>117</sup> And when people (including minors) can easily produce, transmit and/or receive offensive imagery,<sup>118</sup> either sexual or violent, in a digital age and on a multitude of media platforms, including via cell phones,<sup>119</sup> taking medium-specific steps to squelch a particular form of content seems futile. This Article has illustrated how the current two-step, evidentiary and causation quandary compounds this problem significantly. As Part II attempted to demonstrate, medium-specific legal remedies are almost inevitably underinclusive and ineffective measures that fail to materially alleviate whatever problems may exist from minors viewing, hearing, playing or otherwise consuming sexual or violent content. What is more, as Part III explained, actually proving redress through such legislative tactics—the second step of the quandary—is a difficult and daunting task.

It is time, then, to end the medium-specific regulation of sexual and violent content and, instead, to let technological remedies administered by parents on an individual and voluntary basis take the place of government-mandated censorship. For instance, in August 2007, the U.S. Senate Commerce Committee approved legislation “asking the FCC to oversee the development of a super V-chip that could screen content on everything from cell phones to the Internet.”<sup>120</sup> Specifically, the Child Safe Viewing Act of 2007<sup>121</sup> calls for the FCC to “initiate a proceeding to consider measures to encourage or require the use of advanced blocking technologies that are compatible with various communications devices or platforms,”<sup>122</sup> including technologies that “may be appropriate across a

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117. Kathleen Deveny with Raina Kelley, *Girls Gone Bad; Paris, Britney, Lindsay & Nicole: They Seem to be Everywhere and They May Not Be Wearing Underwear*, NEWSWEEK, Feb. 12, 2007, at 40 (writing that “[l]ike never before, our kids are being bombarded by images of oversexed, underdressed celebrities who can’t seem to step out of a car without displaying their well-waxed private parts to photographers” and adding that one study has “concluded that for white teens, repeated exposure to sexual content in television, movies and music increases the likelihood of becoming sexually active at an earlier age”).

118. Indeed, technology has made it such that minors themselves become child pornographers when they tape themselves having sex and, in turn, the tape is transmitted via cell phones and posted on the Internet. See Linda Espenshade, *Teens: Watch What You Post - Experts Warn Sexual Material Can Bring Big Trouble*, INTELLIGENCER J., May 1, 2007, at A1 (describing actual cases and scenarios in which minors who use technology to record themselves become child pornographers).

119. See, e.g., Tom Lyons, *How He Handled Her Photo is a Crime*, SARASOTA HERALD-TRIB., Sept. 2, 2007, at B1 (describing how a middle-school boy “faced possible expulsion because a teacher who confiscated his cell phone found photos showing the kid’s girlfriend in her underwear. The boy hadn’t even taken the photos. They had been sent to his phone,” and noting that “[t]oday, sexy photos can easily be taken by teens, and the photos are easy to copy, easy to transmit and easy to post online”).

120. Brooks Boliek, *It’s Super V-chip to the Rescue*, HOLLYWOOD REP., Apr. 3, 2007.

121. Child Safe Viewing Act, S. 602, 110th Cong. (2007).

122. S. 602 § 3(a).

wide variety of distribution platforms, including wired, wireless, and Internet platforms”<sup>123</sup> and that “may be appropriate across a wide variety of devices capable of transmitting or receiving video or audio programming, including television sets, DVD players, VCRs, cable set top boxes, satellite receivers, and wireless devices.”<sup>124</sup>

This represents a technological, intermedia (as opposed to a medium-specific or intramedia) solution that does not call for censorship of specific sexual or violent content. Instead, as Senator Mark Pryor (D. – Ark.) wrote in an official statement in August 2007 after the bill passed the Senate Commerce Committee, the technology would “expand parents’ ability to protect their children from inappropriate scenes and language on television, online, and other viewing devices.”<sup>125</sup> The danger, of course, with the development of such technology is that someday the FCC might mandate its actual use by parents of minors rather than simply require its installation on communication devices and leave the choice up to parents about whether or not to employ it. At the very least, however, Pryor seems aware that medium-specific remedies are of little practical benefit today and that technology that empowers parents is more desirable. As a Pryor press release put it in February 2007, “with over 500 channels and video streaming, parents could use a little help.”<sup>126</sup>

Ultimately, medium-specific remedies cannot effectively put the twin genies of sexual and violent expression, in all their myriad forms and along with all of the alleged injuries some people would like to ascribe to them, back into their respective bottles and out of the reach of minors. Tamping down such expression on one medium, when it surely will crop up on another, simply is fruitless, like engaging in a never-ending arcade game of Whac-a-Mole.

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123. S. 602 § 3(b)(1)..

124. S. 602 § 3(b)(2).

125. Press Release, U.S. Senator Mark Pryor, Pryor Measure to Empower Parents Over Indecency Advances (Aug. 2, 2007), *available at* <http://pryor.senate.gov/newsroom/details.cfm?id=280332>.

126. Press Release, U.S. Senator Mark Pryor, Pryor Targets Technology Advancements to Expand Education Opportunities for Minorities, Protect Children from Indecency (Feb. 15, 2007), *available at* <http://pryor.senate.gov/newsroom/details.cfm?id=269340>.